REPORT | SECOND SESSION | THIRTY-NINTH PARLIAMENT

Special Committee to Review the Freedom of Information and Protection of Privacy Act

LEGISLATIVE ASSEMBLY
PROVINCE OF BRITISH COLUMBIA

MAY 2010

May 31, 2010

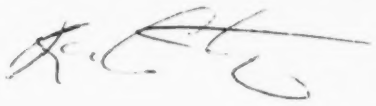
To the Honourable
Legislative Assembly of the
Province of British Columbia

Honourable Members:

I have the honour to present herewith the Report of the Special Committee to Review the *Freedom of Information and Protection of Privacy Act.*

The Report covers the work of the Special Committee from October 5, 2009 to May 31, 2010.

Respectfully submitted on behalf of the Special Committee,



Ron Cantelon, MLA
Chair

Table of Contents

Composition of the Committee i

Terms of Reference ii

Executive Summary iii

The Statutory Framework 1
- 1997-99 Statutory Review 1
- 2003-04 Statutory Review 1
- Amendments to the Act, 2004-08 1
- 2009-10 Statutory Review 2

Contemporary Trends 3
- Changes in Information Technology 3
- Movement towards Open Government 3
- Privacy Challenges 4

The Consultation Process 5
- Briefings 5
- Privacy Conference 5
- Public Consultation 6

Part 1 – Introductory Provisions 7
- Section 1 Definitions 7
- Section 2 Purposes of this Act 7
- Section 3 Scope of this Act 8

Part 2 – Freedom of Information 12

Division 1 – Information Rights and How to Exercise Them 12
- Routine proactive disclosure 12
- Section 4 Information rights 13
- Section 5 How to make a request 14
- Section 6 Duty to assist applicants 15
- Section 7 Time limit for responding 15
- Section 11 Transferring a request 16

Division 2 – Exceptions 16
- Section 14 Legal advice 17
- Section 20 Information that will be published or released within 60 days 18
- Section 22 Disclosure harmful to personal privacy 18

Division 4 – Public Interest Paramount 20
- Section 25 Information must be disclosed if in the public interest 20

Part 3 – Protection of Privacy 21
- Privacy provisions 21

Part 4 – Office and Powers of the Information and Privacy Commissioner 26
- Section 42 General powers of commissioner 26

Part 5 – Reviews and Complaints 28
Section 56 Inquiry by commissioner 28
Section 59 Duty to comply with orders 28
Part 6 - General Provisions 29
Section 66 Delegation by the head of a public body 29
Section 71 Records available without request 29
Section 75 Fees 30
Summary of Recommendations 31
Appendix A: Schedule of Meetings 35
Appendix B: Witness List 37

Composition of the Committee

Members

Ron Cantelon, MLA	Chair	Parksville-Qualicum
Doug Routley, MLA	Deputy Chair	Nanaimo-North Cowichan
Harry Bloy, MLA		Burnaby-Lougheed
Stephanie Cadieux, MLA		Surrey-Panorama
Katrine Conroy, MLA		Kootenay West
Marc Dalton, MLA		Maple Ridge-Mission
Eric Foster, MLA		Vernon-Monashee
Guy Gentner, MLA		Delta North
Douglas Horne, MLA		Coquitlam-Burke Mountain
Jenny Wai Ching Kwan, MLA		Vancouver-Mount Pleasant
Harry Lali, MLA		Fraser-Nicola
Ralph Sultan, MLA		West Vancouver-Capilano

Clerk to the Committee

Craig James, Clerk Assistant and Clerk of Committees

Research Staff

Josie Schofield, Manager, Committee Research Services

Kathryn Butler, Committee Researcher

Byron Plant, Committee Researcher

Terms of Reference

On February 10, 2010, the Legislative Assembly approved a motion that a Special Committee be reappointed to continue its review of the *Freedom of Information and Protection of Privacy Act* (RSBC 1996, c. 165) pursuant to section 80 of that Act, and that the Special Committee so appointed shall have the powers of a Select Standing Committee and is also empowered:

(a) to appoint of their number, one or more subcommittees and to refer to such subcommittees any of the matters referred to the Committee;

(b) to sit during a period in which the House is adjourned, during the recess after prorogation until the next following Session and during any sitting of the House;

(c) to adjourn from place to place as may be convenient;

(d) to conduct public consultations by any means the Committee considers appropriate, including but not limited to public meetings and electronic means; and

(e) to retain personnel as required to assist the Committee;

and shall report to the House by May 31, 2010; to deposit the original of its reports with the Clerk of the Legislative Assembly during a period of adjournment and upon resumption of the sittings of the House, the Chair shall present all reports to the Legislative Assembly.

Executive Summary

In October 2009, the Legislative Assembly appointed the all-party Special Committee to conduct the third review of the *Freedom of Information and Protection of Privacy Act*, the province's public sector access and privacy law.

During the consultation process, 118 submissions were received from a variety of stakeholders - including provincial and local public bodies, professional organizations, advocacy groups, labour unions and concerned citizens.

This report contains 35 recommendations that are designed to ensure the Act remains current. Eleven of these recommendations were originally made in 2004 by this Committee's predecessor.

To improve access, the Special Committee is reiterating the call for public bodies to adopt the practice of routine proactive disclosure of electronic records, made by the two previous statutory review committees. In its opinion, implementation of recommendations 7, 8 and 9 would promote a culture of openness and reduce the need for formal access requests to obtain general information. This would also reduce the cost to the public purse.

In regard to exceptions to access, the Special Committee is recommending that section 14 (Legal advice) become a mandatory exception. No change, though, is proposed for section 13 (Policy advice or recommendations), despite the considerable interest in amending this provision.

In the privacy field, the question of whether to adopt consent provisions, similar to the private sector privacy law, was a controversial topic. The Committee agreed on other recommendations, including consultations on data-sharing initiatives, and a new position of Government Chief Privacy Officer.

The report also contains recommendations to elaborate on the purposes of the Act, and to expand the scope of the Act to cover records of corporations and contractors under the control of public bodies.

Other amendments are designed to streamline the processes related to the Office of the Information and Privacy Commissioner and to strengthen the Commissioner's powers.

The final section of the report includes a recommendation to review the Schedule of Maximum Fees to ensure fees are not a barrier to access and that the criterion of reasonableness is used.

The Statutory Framework

The province's *Freedom of Information and Protection of Privacy Act* (the Act) was passed unanimously in June 1992 and came into force in October 1993. In keeping with other public-sector access and privacy laws, the Act seeks to strike a balance between the right of citizens to access information held by public bodies, and the right to have their own personal information protected.

1997-99 Statutory Review

Section 80 stipulates that review of the Act must take place at least once every six years, with the first six-year period to begin on October 4, 1997. The first all-party special committee to conduct a statutory review began its work in the fall of 1997. During this review, the committee heard 116 oral presentations and received 136 written submissions. Based on the input received from the public, the committee recommended 18 changes to the Act in its report tabled in July 1999. Legislative amendments enacted in 2002 included the provincial government's response to the 1999 report.

2003-04 Statutory Review

The second statutory review of the legislation began with the appointment of an all-party special committee by the Legislative Assembly on May 29, 2003. This review coincided with the passage and implementation of the province's new private sector privacy law, the *Personal Information Protection Act* (SBC 2003 c. 63), which came into force on January 1, 2004. Following its review of the access and privacy provisions of the public sector privacy law, the committee made 28 recommendations in its report tabled May 19, 2004. Half of these recommendations have either been completed or addressed through legislative amendments, and 14 are still under consideration.

Amendments to the Act, 2004-08

In 2004, important amendments were made to the Act in response to the USA PATRIOT Act. Provisions were added that limit storage and disclosure of personal information outside of Canada; prevent access to personal information from outside Canada; provide whistleblower protection; and institute fines for unauthorized disclosure of personal information.

Further amendments in 2005 were designed to improve information-sharing among public bodies for common or integrated programs and activities.

The most recent amendments to the Act were made in the spring of 2008, and included provisions to permit public bodies to routinely disclose predetermined personal information, and to strengthen the office and powers of the Information and Privacy Commissioner.

2009-10 Statutory Review

Pursuant to section 80 of the Act, on October 5, 2009, the Legislative Assembly appointed an all-party Special Committee to conduct the third review of the *Freedom of Information and Protection of Privacy Act* (RSBC 96, c. 165) and to report back to the House by May 31, 2010. As parliamentary committees in British Columbia are appointed on a sessional basis, the House reappointed the Special Committee on February 10, 2010, at the start of the second session of the 39th Parliament, and granted it the same terms of reference to complete its work.

Contemporary Trends

Like our colleagues who conducted the previous statutory reviews, members of the Special Committee believe it is important to consider the broader social and political context within which the *Freedom of Information and Protection of Privacy Act* operates. Accordingly, before reporting on the results of the third statutory review, we would like to comment briefly on three contemporary trends affecting access and privacy rights: changes in information technology; the open-government movement; and privacy challenges.

Changes in Information Technology

Now more than ever before, British Columbians are living in the Information Age and using the Internet for a variety of information, communication, and data-sharing purposes. It has been recently reported that 92 percent of the population now have access to the Internet. Provincial initiatives to expand broadband Internet connectivity, such as NetworkBC, have helped to "bridge the digital divide" in rural and remote areas of the province.

The Internet has dramatically altered the ways in which data are stored and shared. Sometimes referred to as "cloud computing", the general shift towards Internet-based computing has allowed for freer transfer of information independent of specialized hardware and proprietary software platforms. Perhaps there is no greater example of this than the growing use of online social media applications such as Facebook, Twitter, Flickr, and YouTube. It has been recently estimated that 12 million Canadians use Facebook, and over two-thirds of Canadians have either stored data online or used a web-based software application. In addition to providing a way to connect with families and friends, social media applications have also provided new means for governments, as well as political actors and institutions, to interact and share information with citizens.

Movement towards Open Government

For governments, cloud computing offers new opportunities for proactive disclosure, or the automatic release of certain types of records. Proactive disclosure provides efficient and cost-saving ways for government agencies to share general information. It also serves to further government transparency and ensure accountability to citizens, which are both essential tenets of democracy.

Since 2004, several countries have taken steps to proactively disclose more information. In the United States, for instance, President Barack Obama pledged to increase government openness, accountability and transparency. Immediately after taking office in January 2009, he issued a memorandum to the heads of executive departments and agencies, directing them to "take affirmative steps to make information public. They should not wait for specific requests from the government. All agencies should use modern technology to inform citizens about what is known and done by their Government. Disclosure should be timely." Since then, the US federal government has launched the website Data.gov, which provides datasets generated by the executive branch from across the country.

The United Kingdom has been another leader in the area of routine proactive disclosure. Since 2005, public authorities have had to adopt and publish publication schemes setting out the types of information that public authorities make routinely available and how this can be accessed. Following an extensive review of publication schemes, the Information Commissioner's Office introduced a model publication scheme for all public authorities to adopt on January 1, 2009.

Some jurisdictions within Canada have taken similar steps to make certain types of government information more readily available to citizens. The practice of routine disclosure has been adopted at the federal level under the *Access to Information Act*, which sets out a mandatory publication scheme for government departments. Several Canadian municipalities have also made their records more publicly available without the need for a formal request. In British Columbia, for instance, the cities of Nanaimo and Vancouver have unveiled open-data websites that facilitate access to municipal information such as building permits and property searches.

Privacy Challenges

In addition to promoting access, changes in information technology have also had an impact in the privacy field. The growing use of firewalls and data encryption provides examples of ways in which governments have utilized technology to enhance privacy protection. On the other hand, they have raised new challenges for privacy protection. According to a 2010 report of the Privacy Commissioner of Canada, privacy risks associated with cloud computing technologies include: problems of jurisdiction; misuse of personal information arising from the creation of new data streams; concerns about the security of on-line transactions and storage; data intrusion; unintended consequences of lawful access; security issues surrounding "outsourcing for processing"; misuse of processing data; risk of data permanence; and concerns about data ownership.

Two recent privacy breaches in BC involved inappropriate disclosure of government information. In the first case, in December 2009, a provincial government employee was alleged to have used a government e-mail account to send confidential data to an American border guard in Washington State. In another case last year, documents containing the personal information of over 1,400 clients were found in the home of a government employee under RCMP investigation for other matters. The reports of three investigations into this second case included recommendations to improve education, training, policies and procedures to prevent a similar situation occurring in the future.

The Consultation Process

To carry out its mandate, the Special Committee to Review the *Freedom of Information and Protection of Privacy Act* followed the precedent set by the first two statutory review committees and consulted directly with stakeholders and the public at large to inform its deliberations on the content of its report. The schedule of its meetings is contained in Appendix A.

Briefings

The Special Committee heard first from the two entities charged with monitoring and administering the Act: the independent Office of the Information and Privacy Commissioner (OIPC) for British Columbia and the Ministry of Citizens' Services (MCS). These preliminary briefings took place on October 28, 2009 and each provided an overview of the legislation. The A/Executive Director of the OIPC summarized access to information legislation; the privacy context; the scope of the Act's coverage; the FOI process; and the Office's role of independent oversight. The MCS representative was the Director of Legislation and Strategic Privacy Practices, Knowledge and Information Services Branch. She reviewed the Act's purpose, scope/coverage and structure; the Ministry's responsibilities; right of access; exceptions to access; privacy protection; and amendment history.

In March 2010, the OIPC and the provincial government presented formal submissions, containing their recommendations for legislative amendments. The Deputy Minister of Citizens' Services and the Government Chief Information Officer, accompanied by the Deputy Minister for Housing and Social Development and the Deputy Solicitor General, presented the Government submission on March 24, 2010. Part I, Background Information, contained an overview of the Act and its limitations, amendment history, changes since 1992 and international comparisons. Part II of the Government submission focused on the practical challenges ministries are facing. Specific topics covered include ministry themes for reform, ministry examples, and a summary of recommendations.

The Acting Information and Privacy Commissioner presented the OIPC submission to the Special Committee on March 31, 2010. Topics covered included privacy protection; the current privacy environment; and the Office's recommendations on privacy and access.

Privacy Conference

Committee members and research staff attended the provincial government's 11th annual privacy and security conference, "Navigating the Digital Ocean: Riding the Waves of Change", held at the Victoria Conference Centre, February 8-10, 2010.

Public Consultation

The Special Committee initiated the public consultation process in the fall of 2009. Organizations that had participated in the first two statutory reviews were contacted and invited to participate in the third review of the Act, by providing a written submission or appearing at a public hearing.

The call for submissions was posted on the committee's website, and advertisements were placed in the province's daily newspapers in November. The deadline for written submissions was originally set for January 29, 2010, but later extended to March 15, 2010. Participants were asked to submit their assessment of the Act and ideas for improvement, by mail, e-mail, fax, or in a video or audio file.

In December 2009, two public hearings were advertised in the province's dailies and community newspapers. The Special Committee heard from 22 presenters at the hearings in Vancouver (February 2, 2010) and Victoria (February 3, 2010), and received 118 written submissions – a higher level of participation than in 2004. The participants included representatives of the broad range of public bodies covered by the Act, including provincial government ministries, Crown corporations, and local public bodies. Equally important, the Committee also heard from advocacy groups, labour unions and individual citizens with experience in requesting personal information and/or general information from public bodies. A complete list of witnesses who participated in the consultation process is provided in Appendix B.

Before turning to report on the outcome of our consultations, Members of the Special Committee would like to thank everyone who participated in the third statutory review of the Act. We received a lot of ideas and suggestions on how to improve the legislation. This input has been very helpful in the deliberations stage, during which we considered whether the legislation needs updating, and how we could strike an appropriate balance between access and privacy rights. For some of us, frankly, it turned out to be a difficult struggle to reconcile what seems to be an inherent contradiction in the title and structure of the statute. At the same time we recognize that the legislation reflects the tension between freedom of information and privacy protection in modern society.

Part 1 – Introductory Provisions

Part 1 of the *Freedom of Information and Protection of Privacy Act* (the Act) contains three sections: definitions, purposes and scope. During the consultation process, the Special Committee received proposals for legislative amendments affecting each of these provisions.

Section 1 Definitions

Definitions of terms used in the Act are contained in Schedule 1. The Special Committee received requests from the two justice ministries and the provincial bodies representing lawyers and school trustees to amend the definition of "law enforcement". Other submissions proposed changing the definitions of "personal information" and "health care body". After careful consideration, we have decided that the existing definitions of these terms in Schedule 1 are adequate.

Section 2 Purposes of this Act

Section 2 states that the intended purposes of the Act are to make public bodies more accountable to the public and to protect personal privacy. It also outlines how these purposes will be achieved.

With regard to this provision, the previous statutory review committee made the following recommendation in its 2004 Report:

> *Add a new section 2(3) stating that the Act recognizes that new information technology can play an important role in achieving the purposes outlined in subsection (1), particularly with respect to promoting a culture of openness and informal access to information by enhancing privacy protection.*

During the consultation process, the Special Committee heard from the Ministry of Citizens' Services that this recommendation remains under consideration. We also received pleas for its speedy implementation from the major advocacy group, the Freedom of Information and Privacy Association, and members of the BC Branch of the Canadian Bar Association. We too urge government to take action along the lines recommended in the 2004 Report, since we believe information technology has the capabilities to strengthen both access rights and privacy rights.

Recommendation 1:

Add a new section 2(3) to acknowledge that information technology plays an important role in achieving the dual purposes of the Act, by facilitating the routine disclosure of general information as well as enhancing safeguards for privacy protection.

The Special Committee also considered an amendment proposed by the OIPC. Its submission pointed out that section 2 does not acknowledge that an infringement of the right to privacy must be reasonable and justifiable, whereas this concept is in the *Personal Information Protection Act.*

We support this amendment since we think it is desirable to harmonize the language of the public sector and private sector privacy laws, wherever practicable.

Recommendation 2:

Add a new section 2(4) to require that for an infringement of the right to privacy to be lawful, it must be proportional to the public interest that is achieved.

Section 3 Scope of this Act

Section 3 defines the records that are covered by the Act as those in the custody or under the control of a public body. It also lists the types of records that are not covered by the Act.

The Act applies to some 2,900 public bodies in British Columbia, the widest scope of any jurisdiction in Canada. All are either fully or partially taxpayer-funded, perform vital public functions or services for other public bodies, or are bodies in which the provincial government has a controlling interest. Provincial ministries, agencies, boards and commissions and most Crown corporations have been covered since October 1993. The category of local public bodies comprises local government bodies (e.g. municipalities, regional districts and police boards), health care bodies (e.g., hospitals, health boards) and educational bodies (e.g. universities, colleges and school boards). Local public bodies have been covered since November 1994, and they are listed in Schedule 2 of the Act. Self-governing bodies of a profession or occupation (e.g., doctors, lawyers and teachers) have been covered since May 1995, and they are listed in Schedule 3.

The Special Committee received several proposals to expand the scope of the Act to cover the records of any entity that receives taxpayers' money; however, we consider this type of amendment to be much too broad. Other requests for the exclusion of claim files and files relating to all phases of a police investigation were also rejected because of our concerns about the impact on access rights.

At the Victoria public hearing, we were asked to consider inclusion of a strata corporation as a local public body under Schedule 3; however, a private entity obviously does not qualify under this Act. Nine written enquiries were also received from people seeking access to strata council records, and they were referred to relevant information resources available on the OIPC website.

BCSPCA

The Special Committee revisited one case of exclusion first examined by the second statutory review committee, which made the following recommendation in its 2004 Report:

> *Investigate why the B.C. Society for the Prevention of Cruelty to Animals was assigned the dual status of a public body and a non-profit society in the first place and whether there is a case for clarifying or even changing its status.*

During the consultation process, the Special Committee was informed by the Ministry of Citizens' Services that its investigation has determined that the BCSPCA does not meet the criteria for a public body under FIPPA, although it does have some regulatory responsibilities under the *Prevention of Cruelty to Animals Act*. According to the Ministry, the BCSPCA does not have dual status; it is a not-for-profit society that acts in part under statute.

Despite this decision, we share the view of the previous committee that the Society qualifies as a public body in terms of having statutory authority to enforce laws relating to animal cruelty, and by virtue of receiving a small annual grant ($75,000) from the Ministry of Agriculture and Lands for the training of animal cruelty investigators. For this reason, we endorse the plea from the Animal Rights Coalition for access to the records pertaining to the status of animals seized by BCSPCA agents.

Recommendation 3:

Include the British Columbia Society for the Prevention of Cruelty to Animals, by using definition (b) of *public body* in Schedule 1 that makes provision for adding an "other body" by regulation to Schedule 2; and add the proviso that access rights pertain only to those records that relate to this Society's statutory powers.

Subsidiary Company

On November 9, 2009, the Supreme Court of British Columbia ruled that the records of Simon Fraser Univentures Corporation are not under the control of SFU and hence not subject to the FIPPA; instead, SFUV is clearly regulated by the PIPA. (SFU v. BC (IPC) 2009 BCSC 1481) This decision is currently under appeal.

In response to this court decision, the Special Committee was asked to consider proposals to expand the coverage of the Act to cover a subsidiary company of a public educational body. The UBC Alma Mater Society, for example, urged us to address the "corporate veil" problem created by the establishment of businesses by some universities and a few school districts. The B.C. School Trustees Association, however, requested a statutory exemption for the records of business companies created under the *School Act* to market education services abroad.

The Special Committee is concerned about the impact the court decision has on access rights, and believes school trustees' concerns about harmful disclosure would be protected under ss. 17 and 21.

To deal with this issue, the Canadian Centre for Policy Alternatives (CCPA) suggested following the lead of other jurisdictions (e.g., State of Virginia, US, UK) and amending the definition of *public body*. The BC Health Coalition and the OIPC also recommended changing this definition.

While the Special Committee is receptive to proposals to include corporations under the definition of public body, we are not inclined to include all the structures listed in the proponents' recommendations. The CCPA and the BC Health Coalition, for example, would include *"organizations, corporations and agencies"*, and the OIPC submission lists *"any board, committee, commission, panel, agency or corporation"* created or owned by a public body.

Recommendation 4: ,

Expand the definition of "public body" in Schedule 1 to include any corporation that is created or owned by a public body, including an educational body.

Contractors' Records

The previous statutory review committee made the following recommendation on the topic of contractors' records in its 2004 Report:

> *Amend Section 3 to clarify that records, including personal information, created by or in the custody of a service provider under contract to a public body are under the control of the public body for which the contractor is providing services.*

During the consultation process, the Special Committee learned from the Ministry of Citizens' Services that this recommendation remains under consideration. We also received numerous submissions urging its implementation. The OIPC, for example, claimed that this amendment is urgently required in order to clear up any confusion on the part of contractors and public bodies regarding who has custody or control of requested records. Other proponents of speedy implementation included advocacy groups, labour unions, librarians and taxpayers. We share their concerns about the delay and urge government to take action.

Recommendation 5:

Amend Section 3 to clarify that records created by or in the custody of a service-provider under contract to a public body are under the control of the public body on whose behalf the contractor provides services.

Academic Records

The Special Committee received a submission from the Confederation of University Faculty Associations (CUFA) BC, representing over 4,500 academic staff members. Three of their seven recommendations focused on amendments related to section 3:

- CUFA BC recommends that Schedule 1 be amended to include the definition of a "faculty member" (i.e. a person employed by a post-secondary educational body as a tutor, instructor, lecturer, assistant professor, associate professor, professor, researcher, [professional] librarian, program director or in an equivalent position). We recommend replacing the broad phrase "employees of a post-secondary educational body" (as in s.3(1)(e)) with "faculty members".

- CUFA BC recommends that no changes be made to the exemptions of examination and test questions (s. 3(1)(d)) and teaching materials and research information (s.3(1)(e)) from the scope of the Act.

- CUFA BC recommends that new provisions be created in s. 3(1) to clarify that the following records of a faculty member at a public post-secondary institution are excluded from the scope of the Act: a record containing personal notes or annotations, and a record containing personal communications, including e-mail messages. These records are as much part of the scholarly enterprise as the teaching and research materials excluded in s. 3(1)(e), and their exclusion is necessary to protect academic freedom.

The Special Committee thinks the existing exemption for the category of "research information" in section 3(1)(e) is broad enough to incorporate records containing personal notes or annotations, or personal communications. Conversely, we consider the CUFA BC definition of "faculty members" to be too narrow since it excludes teaching support staff (i.e., teaching assistants, tutor markers or persons in equivalent positions). In our opinion, the records of the latter also warrant protection.

Recommendation 6:

Amend section 3(1)(e) by replacing "employees" with "faculty members and teaching support staff" of a post-secondary educational body.

Part 2 – Freedom of Information

Division 1 – Information Rights and How to Exercise Them

Part 2, Division 1 of the Act defines information rights; explains how to make an access request; outlines the duty of a public body to assist applicants; defines what the time limit is for responding; describes what the content of a response should be; explains how access will be given; and specifies the conditions for extending the time limit for responding and for transferring a request.

Routine proactive disclosure

As noted in an earlier section of this report, routine proactive disclosure of government information is now becoming common practice. The previous statutory review committee made the following recommendations on this topic in its 2004 Report:

> *Add a new section at the beginning of Part 2 of the Act requiring public bodies - at least at the provincial government level - to adopt schemes approved by the Commissioner for the routine disclosure of electronic records, and to have them operational within a reasonable period of time.*
>
> *Amend section 13(2) to require the head of a public body to release on a routine and timely basis the information listed in paragraphs (a) to (n) to the public.*

The Special Committee learned from the Ministry of Citizens' Services that these two recommendations remain under consideration. During the consultation process, we received numerous submissions urging government to take action. The OIPC submission, for example, pointed out that routine disclosure could reduce processing costs for public bodies, since they could avoid the necessity of responding individually to specific and often repeated access requests for the same information. Implementation would also enhance openness and provide easier public access to information. Other proponents of proactive release of electronic records included advocacy groups, journalists, labour unions, librarians and taxpayers.

Recommendation 7:

Add a new section at the beginning of Part 2 of the Act requiring public bodies - at least at the provincial government level - to adopt schemes approved by the Information and Privacy Commissioner for the routine proactive disclosure of electronic records, and to have them operational within a reasonable period of time.

The Special Committee supports the proponents' position and reiterates the call for routine disclosure made in 2004. We believe it is imperative that government no longer delays taking action to promote the routine proactive release of electronic records containing the types of general information listed in s. 13(2) – e.g., any factual material, statistical surveys, public opinion polls,

environmental impact statements. This practice has already been implemented at the federal level in Canada. If implemented, routine disclosure would also align British Columbia with the trend towards open government in the USA and, closer to home, with municipal initiatives underway in the cities of Vancouver and Nanaimo.

Recommendation 8:

Amend section 13(2) to require the head of a public body to release on a routine and timely basis the information listed in paragraphs (a) to (n) to the public.

The OIPC submission also proposed that public bodies be required to use information technology to facilitate efficient and cost-effective responses to access requests, which is already a statutory requirement in Nova Scotia and Prince Edward Island. It recommended section 9(2) be amended to require that public bodies provide electronic rather than print records, wherever practicable. CUPE BC made a similar suggestion. The Special Committee supports this amendment because it aligns with citizens' growing preference for receiving information via e-mail.

Recommendation 9:

Amend section 9(2) of the Act to require that public bodies provide electronic copies of records to applicants, where the records can reasonably be reproduced in electronic form.

Section 4 Information rights

Section 4 establishes the public's information rights and the key access principles of the Act: the public has a right of access to all records in the custody or under the control of public bodies, including the right of individuals to personal information about themselves. That right does not extend to information excepted from disclosure under Division 2 of Part 2 of the Act.

On the topic of access requests, the previous statutory review committee made the following recommendation in its 2004 Report:

> *Amend section 4(1) to establish that an applicant who makes a formal access request has the right to anonymity throughout the entire process.*

The Special Committee was informed by the Ministry of Citizens' Services that this recommendation has been resolved through policy. The Ministry explained that in response to the Information and Privacy Commissioner's first annual report on the timeliness of government's access to information responses (February 2009), government has indicated that while there are times when the identity of a requester needs to be known as part of the decision-making process, it will undertake efforts to ensure that anonymity is protected to the greatest extent possible.

Despite the ministry's assurance, the OIPC believed an amendment was still desirable to ensure that timely access to general information is not affected by the nature of the request or the identity of the requester. Its submission points out that one of the findings of its 2009 timeliness report was the fact that the identity of the applicant – particularly one representing the media, a political party or an interest group – had a significant negative impact on how quickly the request was processed. Therefore the OIPC argued that the most efficient way to ensure that all requests are treated equally is to guarantee that the identity of the requester remains shielded throughout the process, known only to the branch responsible for making the decision on disclosure and sending the records to the requester. When the request is for personal information, or business information, the response processes should, wherever possible, also protect anonymity.

The Special Committee agrees with the OIPC that it is important that the Act acknowledges the importance of the democratic right to anonymity.

Recommendation 10:

Amend section 4(1) to establish that an applicant who makes a formal access request has the right to anonymity throughout the entire process.

Section 5 How to make a request

Section 5 describes how to make a formal request for a record under the Act and provides that an applicant may ask for a copy of the record or to view the original record. The submission of the Victoria and Vancouver police departments, however, claimed that providing access to original records is "impracticable" for the following reason:

> *"In accordance with Section 5, and 9, of FOIPPA an applicant may ask for a copy of the record or ask to examine the original record by stating their preference in their written request. In practice, only copies of records (usually in a severed format) are disclosed to applicants. It would be extremely difficult, if not impossible, to apply the provisions of the FOIPPA to original hard copy records without damaging the records. In a police setting, it is extremely important to protect the sanctity of original records for use in criminal proceedings.*
>
> *Sections 5 and 9 require amendment to allow applicants a right of access to original records if reasonable. This will allow police to ensure the "continuity of evidence" and the physical security of evidence, in criminal proceedings. This is particularly the case where evidence or documents were located or created prior to the introduction of digital record-keeping systems, where the concept of "originality" is significantly different."*

While endorsing the amendment, the Special Committee does not believe that protecting the sanctity of an original record prevents a public body from supplying a reasonable facsimile of the record to an applicant when it is impractical to make the original record available for inspection.

Recommendation 11:

Amend sections 5 and 9 to allow applicants a right of access to original records if reasonable.

Section 6 Duty to assist applicants

Subsection 6(1) requires the head of a public body to make every reasonable effort to assist applicants and to respond openly, accurately, completely and without delay.

The submissions of the Alma Mater Society of UBC-Vancouver, CUPE BC, the Canadian Centre for Policy Alternatives, the Dogwood Initiative and the Freedom of Information and Privacy Association voiced concerns about the adequacy of the search process conducted by some public bodies, using their own experiences to demonstrate the problem. Each proposed penalties for heads of public bodies that breach the statutory duty to assist.

The Special Committee has concluded that rather than imposing penalties, it is more important to waive fees to provide some kind of incentive for heads of public bodies who breach the duty to assist.

Section 7 Time limit for responding

Section 7 places a duty on public bodies to respond to requests without delay and imposes a response time limit of 30 days with specific exceptions.

The Special Committee received considerable public input regarding the existing 30-day time limit for responding. Some citizens complained about unreasonable delays in obtaining records, while others proposed more flexibility. Extensions, which fall under s.10, were another topic of concern.

After due deliberation, we have decided not to recommend any changes to the existing timelines in sections 7 and 10 for the following reason. We anticipate that by moving forward with proactive release of electronic records, and fee waivers for non-compliance, there will be a decrease in the number of unreasonable delays.

On the topic of time limits for third-party consultation (sections 23, 24), the Special Committee is reluctant to recommend any changes at this time.

Section 11 Transferring a request

Section 11 stipulates when and how a public body may transfer a request.

During the consultation process, we considered a proposal from the Freedom of Information and Privacy Association to amend section 11 to eliminate the 20-day transfer period for public bodies which are part of the new centralized system for the handling of FOI requests. It pointed out that these requests will be sent to the relevant public body immediately, rather than being transferred among ministries. Another advocacy group, the Dogwood Initiative, suggested amending section 11 to reduce the time allowed for file transfers from 20 days to five business days, or amending s. 11 to reduce the time allowed for the new public body to respond after the transfer.

The Special Committee considered both these suggestions. We concluded that a 10-day reduction is feasible now that a centralized system is in place to handle document requests more efficiently.

Recommendation 12:

Amend section 11 to reduce the time allowed for file transfers to ten business days.

Division 2 – Exceptions

Part 2, Division 2 of the Act specifies the conditions under which information may be refused. There are two kinds of exceptions to access under the Act. Mandatory exceptions require information to be withheld if it meets the criteria listed in the Act. Discretionary exceptions allow information to be released if the head of the public body feels it is in the public interest to do so.

The Special Committee considered requests to amend the mandatory exception, section 12 (Cabinet and local public body confidences) but concluded that it is undesirable to make confidential records more accessible at this time.

With regard to Section 13 (Policy advice or recommendations), we acknowledge that there is considerable interest in amending this discretionary exception along the lines proposed by the second statutory review committee in its 2004 Report. Advocacy groups, the OIPC and some committee members were all in favour of a narrower definition of "policy advice". However, the majority of members think it is prudent to maintain the advice exception for evidence-based interpretations, analyses and recommendations.

After careful consideration, we have decided not to accept amendments to section 15 (Disclosure harmful to law enforcement), proposed by the justice ministries, because subsections (j) and (k) provide public bodies with the authority to refuse to disclose security footage, and we are not persuaded that access should be restricted to police audit records.

We are also not convinced that access needs to be restricted to records of a Crown corporation in negotiations with First Nations (Section 16) or commercial activities (Section 17). Further, we are not persuaded by the school trustees' argument for exempting files relating to labour relations (Section 17), or containing confidential contract information (Section 21). In all these cases, we think existing provisions of the Act are adequate to protect commercial and sensitive information. Lastly, the majority of committee members do not support the call to repeal the ban on hospital abortion statistics (Section 22.1).

Section 14 Legal advice

Section 14 is a discretionary exception to the public's general right of access to legal advice or communications contained in government records under section 4 (Information rights) of the Act.

During the consultation process, the Law Society of British Columbia expressed a concern about the current wording of section 14. It pointed out that by giving the head of a public body the discretion to refuse to disclose information that is subject to solicitor client privilege, it appears by implication to give discretion to disclose privileged information. In its view, there is no basis for a discretion to release privileged information, and so disclosure must be refused. The Special Committee endorses the Law Society's amendment to clear up the ambiguity.

Recommendation 13:

Make section 14 a mandatory exception, by changing "may refuse" to "must refuse", except when the public body is the client and can choose to waive privilege, or, if the client is a third party, the client agrees to waive privilege.

The Insurance Corporation of British Columbia (ICBC) also proposed an amendment to section 14 of the Act stating that decisions on the privileged status of materials must be referred to the Supreme Court of British Columbia, and not be within the purview of the OIPC. Its submission pointed out that following the Blood Tribe decision of the Supreme Court of Canada in July 2008, the former Information and Privacy Commissioner, acknowledging the special status of privilege, developed a separate process to follow for reviews under section 14. However, ICBC maintains that the determination of privileged status should remain the sole prerogative of the court – a position that is not entirely supported by the Trial Lawyers Association of British Columbia.

The Special Committee considers the ICBC proposal to be a reasonable one particularly at the stage when FOI requests are made and the claim files in question are the subject of active litigation.

Recommendation 14:

Amend section 14 of the Act to state that decisions on the privileged status of materials when FOI requests are made must be referred to the Supreme Court of British Columbia.

Section 20 Information that will be published or released within 60 days

Section 20 is a discretionary exception which allows the head of a public body to refuse to disclose information which is currently available for purchase by the public or which will be released to the public or available for purchase by the public within 60 days of the applicant's request.

The Special Committee received a number of submissions proposing amendments to section 20. The Freedom of Information and Privacy Association and the Dogwood Initiative, for example, suggested amending section 20(3) to provide for immediate release of all requested records to the requester if the records in question are not made public after the 60 day period.

Other proposals included a request from the justice ministries that an extension be given if a public report is in the process of being drafted, and the submission of the B.C. School Trustees' Association sought an exemption if the publication of a report is a statutory requirement.

The Special Committee acknowledges that "access delayed is access denied" and supports amendments proposed by advocacy groups to section 20(3) that would prevent a public body changing its mind about release after 59 days, so that the application process has to start over again. At the same time we recognize the need for some flexibility in case unforeseen circumstances prompt a delay. In our opinion, the ministries' proposed timelines for the extension request (3 to 6 months) are too broad, but we think an exemption for reports to be published according to a statutory schedule is a sensible amendment.

Recommendation 15:

Amend s. 20(3) to provide for immediate release of all requested records if 90 days have elapsed since receiving the applicant's request; and to provide that an access request may be refused if the information will be published according to a statutory schedule.

Section 22 Disclosure harmful to personal privacy

Section 22 is a mandatory exception that protects personal privacy of individuals whose personal information is held by a public body. This section requires the head to refuse disclosure of personal information where that disclosure constitutes an unreasonable invasion of a third party's privacy.

In regard to this provision, the previous statutory review committee made the following recommendation in its 2004 Report:

> *Amend section 22(4) to state that it is not an unreasonable invasion of third-party privacy to disclose the personal information of an individual who has been dead for over 20 years.*

During the consultation process, the Special Committee was informed by the Ministry of Citizens' Services that recommendation 14 remains under consideration. The OIPC reported that its

experience in the past six years suggests that there will be occasions when the personal information of an individual deceased for 20 years could cause an unreasonable invasion of personal privacy (eg, if an infant or young child dies as a result of a violent crime). To continue to protect personal information in unusual circumstances, and for the sake of internal consistency with s. 36, the OIPC proposed changes in the wording of the 2004 recommendation, which the Special Committee supports.

Recommendation 16:

Amend s. 22(2) to state that the personal information of an individual who has been dead for over 20 years is a relevant consideration in determining whether the disclosure of the deceased's personal information would be an unreasonable invasion of personal privacy.

The Special Committee considered a proposal from the University of British Columbia (UBC) for another amendment to section 22 relating to protecting the confidentiality of references. The UBC submission pointed out that section 22(3)(h) protects the identity of individuals who provide confidential references or evaluations. However, where the identity of the individual is known to a candidate, section 22(3)(h) and the cases interpreting this provision may offer no similar protection for the contents of the evaluation. UBC has faced this issue in respect of applications for medical or dental schools, where applicants to these schools are asked to provide personal letters of reference. In doing so, the candidate contacts an individual to provide a reference for them and so is aware of the identity of the referee. To protect the confidentiality of the reference, UBC suggested two amendments. The Special Committee agrees the proposed wording of the amendments will clear up the ambiguity.

Recommendation 17:

Amend section 22(3)(h), as follows: "The disclosure could reasonably be expected to reveal the substance of a personal recommendation, or evaluation, character reference, or personnel evaluation, that was supplied in confidence by a third party, or, to reveal the identity of the third party who supplied the reference in confidence". A corresponding amendment would be required to repeal section 22(5).

The Special Committee also considered a submission from the University of Victoria to make explicit in the Act the university's authority to disclose personal information about degrees, displomas and certificates. It proposed a minor amendment to section 22(4)(i) to include academic credentials as a discretionary benefit similar to a licence or permit, which we think is a sensible suggestion.

Recommendation 18:

Amend section 22(4)(i) by adding "degree, diploma or certificate".

Division 4 – Public Interest Paramount

Section 25 Information must be disclosed if in the public interest

Section 25 is a general override provision that obligates the head of a public body to disclose information where disclosure is clearly in the public interest. Even if information falls within an exception to disclosure, section 25 requires the release of the information. The current wording of subsection (1) permits the head of a public body to disclose information "(a) about a risk of significant harm to the environment or to the health and safety of the public or a group of people, or (b) the disclosure of which is, for any other reason, clearly in the public interest."

The OIPC submission described the wording of section 25(1) as too narrow to have any real impact. It argued that the legislative criteria for release of records in the public interest must be broadened to mandate the disclosure of non-urgent information that nevertheless concerns a matter of clear public interest, such as a report addressing how a public authority dealt with a public health issue. Similar proposals were submitted by advocacy groups, unions, librarians and a drafter of the original Act. The Freedom of Information and Privacy Association, for example, suggested an amendment to take into account the ruling on public interest by the Supreme Court of Canada in Grant v. Torstar Corp.

The Special Committee reviewed the relevant sections of this court decision, including para. 102 which suggests that to qualify as a topic of "public interest", "it is enough that some segment of the community would have a genuine interest in receiving information on the subject." We think there is a case for adding this type of criterion to the existing list.

Recommendation 19:

Review section 25(1) in light of the Supreme Court of Canada decision, Grant v. Torstar Corp.

Part 3 – Protection of Privacy

Part 3 of the *Feedom of Information and Protection of Privacy Act* consists of two divisions. Division 1 contains provisions relating to the collection, protection and retention of personal information by public bodies. Division 2 covers the use and disclosure of personal information by public bodies.

Privacy provisions

Government submission

The Government submission was presented to the Special Committee on March 24, 2010. It described the Act's privacy provisions governing the collection, use and disclosure of personal information as representing "highly prescriptive, rules-based legislation". Government's overall conclusion is that the current Act has ill-defined terms that result in multiple conflicting interpretations and impede joint coordinated programs due to confusion over what is permitted.

Key restrictions of the Act include the limitations on collection, in particular the inability for an individual to consent explicitly to the collection of their personal information by a public body or its use for a different purpose. This inability to consent can become a problem when public bodies are considering how the information can be used later on. The Government submission pointed out that there are more liberal provisions for collection, use and disclosure of similar information in the *Personal Information Protection Act* that covers private sector organizations.

Another limitation is the wording in the statute that creates impediments in the implementation of consistent-purpose programs. For example, section 33.2(d), added in 2005, is difficult to operationalize at the bureaucracy level. The current challenge facing government is how to share a person's personal information with, say, two different programs they have some involvement with.

Also, the wording of the Act inhibits the government's ability to embrace the recent IT trend toward cloud computing for efficiency measures or just good business practices.

To summarize, the nature of the way government works has changed significantly since the Act was written. Government ministries and agencies are encountering common challenges to implement innovative ways of providing more effective, integrated services to citizens, due to the limitations in the Act. The major thrust of their recommendations is to break down barriers across ministries in the interest of sharing information to deal with increasingly complex health and social issues:

- permitting an individual to consent to collection, use and disclosure
- allowing indirect collection of information where a citizen is involved in an integrated program, or where a ministry sees a benefit to a citizen
- recognizing the range of common-purpose programs and activities

- recognizing the fact that government works in a horizontal way to try and deliver the best services to citizens and needs to share information with public bodies and non-public bodies
- recognizing that social media make jurisdictional boundaries artificial and promote engagement
- taking advantage of commercial opportunities, including cloud computing
- adopting a broader approach to research, including applied research for program planning/evaluation

Some committee members were sensitive to the reservations of the OIPC and privacy advocates about the collective impact the proposed amendments would have on privacy rights. They also questioned whether the concept of consent was meaningful because of the power imbalance between the clients and providers of on-line, integrated government services. The majority of committee members, though, are in favour of adding consent provisions to the public sector privacy law, and clarifying the definition of research.

Recommendation 20:

Amend the Act to allow an individual to consent to the collection, use and disclosure of their personal information by a public body (similar to the *Personal Information Protection Act*).

Recommendation 21:

Amend the Act to include language confirming a broader approach to research so that applied research into issues, facts, trends, etc for the purpose of program planning and/or evaluation can be undertaken, provided that only de-identified data are used.

The Special Committee shared a common position on the other five government recommendations. We do not support the idea of indirect collection of personal information, without consent, except for the extenuating circumstances specified in the existing Act, nor the addition of an implicit-consent clause. With regard to the recommendations promoting information sharing, we do not think a compelling case was made in general terms to expand the consistent-purpose provision, and the language of the amendments was not specific enough to guide committee members during their deliberations.

Lastly, we are not prepared to recommend amending the provision in the Act prohibiting the storage of information outside Canada to take into account changes in information technology. We believe it is important to protect the integrity of records held by BC public bodies as much as we can. At the same time we are aware that controlling data transfers poses challenges for a provincial jurisdiction located adjacent to the USA.

OIPC submission

The OIPC submission, presented to the Special Committee on March 31, 2010, also focused on the privacy provisions of the Act. The submission pointed out that new information technologies enable data sharing initiatives on a scale and frequency that were never contemplated at the time the Act was drafted. The new ways in which the personal information contained in electronic databases is being collected, used and disclosed in data sharing projects raise significant privacy issues. When there is a bulk disclosure of personal information from a large database of one public body to another public body, citizens usually do not know how their personal information is being reconfigured, who is accessing it, for what purpose, whether it is accurate and how they can access it. This is particularly true where the transferred data is linked with personal information in other databases.

For this reason, the OIPC argued the public must be engaged in discussions around protecting privacy rights in data sharing projects. Its submission recommended that a code of practice be developed by government in an open and transparent manner with stakeholder consultation through something like a White Paper process. A public consultation process on data sharing was successfully conducted by government and the Commissioner's office in Britain in recent years.

The Special Committee supports the idea of a consultation process because we see it as a way to educate British Columbians on how the Act works now and how requests are treated by public bodies. We have concerns, though, about the prescriptive tone and broad scope of this OIPC amendment (as well as the one requiring the Commissioner's approval for data-sharing initiatives). Our own recommendation to government in regard to consultation is more modest.

Recommendation 22:

Consider holding public consultations on data sharing initiatives.

The OIPC submission also stated that a government-appointed Chief Privacy Officer is urgently required to act as a privacy advocate in the decision-making process and to ensure that privacy is fully considered and respected in any new initiative. This recommendation had been made by the former Information and Privacy Commissioner, and the current A/Commissioner in his investigation report into a recent privacy breach.

While the Special Committee is reluctant to create a new layer of bureaucracy, we think there is a need to educate ministries about what they can and cannot do in regard to privacy matters.

Recommendation 23:

Appoint a Government Chief Privacy Officer.

The OIPC submission suggested too that some form of specific ethics review is necessary and desirable for government's data sharing activities for the purposes of research. Complementary research-governance measures should be adopted in addition to the approval role for the OIPC.

A committee of experts should be appointed by government that would function in a manner similar to research ethics boards of universities and the stewardship committees of the Ministry of Health Services. It would apply the criteria in s. 35(1) of the Act and such other criteria as are considered desirable in the committee's terms of reference. The committee's approval should be a mandatory precondition to disclosure of personal information by any public body for research purposes.

Recommendation 24:

Amend the Act to require that data sharing projects for the purpose of research must be subject to ethics review by an arm's length stewardship committee.

Lastly, the OIPC submitted that it should be specified in the Act that privacy impact assessments must be completed at the conceptual, design and implementation phases of databases. This requirement should be extended to health authorities as they use databases containing very sensitive personal information to a significant degree.

The Special Committee supports this proposal because it would save money down the road and offer the best protection for citizens' privacy.

Recommendation 25:

Add a requirement in the Act that privacy impact assessments must be completed at the conceptual, design and implementation phases of an electronic record project. This requirement should apply to health authorities as well as government ministries.

Public input

The Special Committee also considered the public input on the Act's privacy provisions. After careful consideration, we concluded that a privacy charter and the appointment of a privacy officer for each public body are both unnecessary. Also, as noted earlier in this section, we are not in favour of lifting the ban on disclosure and storage of personal information outside Canada at this time.

Other proposals we considered included requests that section 27 be clarified with respect to the collection of employee personal information. BC Hydro, UBC and members of the BC Branch of the Canadian Bar Association suggested harmonizing the provisions of the Act with the private sector privacy law so that public bodies can conduct employment investigations and collect employee personal information directly/indirectly without notice.

The Special Committee believes the province's privacy laws should be consistent, wherever possible. We also agree with lawyers who work in the privacy field that the language of the amendment should make it clear that employment investigations conducted without consent would not permit targeted or indiscriminate collection of information or monitoring that has no reasonable basis.

Recommendation 26:

Amend the Act to reflect the approach taken in the *Personal Information Protection Act* with respect to the collection of employee personal information.

Individual citizens at the Victoria hearing urged the Special Committee to consider including provisions that allow health care providers to share health information with immediate family members. The written submission of the BC Schizophrenia Society, Vernon branch recommended that professionals in the mental health community be educated more thoroughly about information sharing with family members, since the existing Act permits disclosure in certain circumstances.

The Special Committee has struggled with this complex legal issue. While we are sympathetic to caregivers seeking information, we are also mindful that some adults do not want their information shared with family members, and that the privacy of all individuals must be protected.

Recommendation 27:

Re-examine the protocols regarding sharing health information with immediate family members.

The Special Committee also considered two requests to amend the Act to accommodate health-related research. The Canadian Institute for Health Information requested that health care bodies be permitted to disclose health data without the individual's consent so that the Institute can analyze resource allocation and health human resource planning across jurisdictions. The submission of Population Data BC expressed concern that ambiguities in section 35 of the Act can cause delays in access to administrative data for research projects.

The Special Committee agrees that personal health information is vital to research and future planning, as long as the data are de-identified to protect personal privacy.

Recommendation 28:

Amend section 35 of the Act to permit a health care body to disclose de-identified personal health information without the individual's consent for legitimate research purposes.

Part 4 – Office and Powers of the Information and Privacy Commissioner

Part 4 of the *Freedom of Information and Protection of Privacy Act* establishes the Information and Privacy Commissioner (Commissioner) and a supporting office. The Commissioner has a continuing responsibility to ensure that public bodies are complying with the letter and spirit of the Act. The Commissioner's powers include investigating complaints and reviewing the decisions of the heads of public bodies on requests for information under the Act.

Section 42 General powers of commissioner

In regard to this section, the previous statutory review committee made the following recommendations in its 2004 Report:

> *Amend section 42 to explicitly give the Commissioner the power to require public bodies to submit statistical and other information related to their processing of freedom-of-information requests, in a form and manner that the Commissioner considers appropriate.*
>
> *Combine the complaint process and the review and inquiry process - referred to in sections 42(2) and 52(1) respectively - into a unitary process for the Commissioner to investigate, mediate, inquire into and make orders about complaints respecting decisions under the Act and other allegations of non-compliance with the Act.*

During the consultation process, the Special Committee was informed by the Ministry of Citizens' Services that these two recommendations remain under consideration. We endorse the call made by the OIPC for their speedy implementation.

Recommendation 29:

Amend section 42 to explicitly give the Commissioner the power to require public bodies to submit statistical and other information related to their processing of freedom-of-information requests, in a form and manner that the Commissioner considers appropriate.

Recommendation 30:

Combine the complaint process and the review and inquiry process - referred to in sections 42(2) and 52(1) respectively - into a unitary process for the Commissioner to investigate, mediate, inquire into and make orders about complaints respecting decisions under the Act and other allegations of non-compliance with the Act.

The Special Committee also considered and rejected the OIPC request to give the Commissioner the power to ensure compliance with the *Document Disposal Act*. We believe the existing oversight undertaken by the Public Documents Committee and the all-party Select Standing Committee of Public Accounts of the Legislative Assembly is adequate.

Part 5 – Reviews and Complaints

Section 56 Inquiry by commissioner

Section 56 establishes the process to be followed by the Commissioner when conducting an inquiry to settle a matter under review and stipulates that such an inquiry must be completed within 90 days.

The OIPC informed the Special Committee that the Office had exceeded the 90-day limit in order to complete almost half of the 586 request-for-review files that were closed in 2009. It pointed out that section 56 is currently silent about the ability to extend the 90-day timeline, unlike section 50(8) of the *Personal Information Protection Act* that allows the Commissioner to specify a later date.

The Special Committee agrees that the Commissioner should be permitted to extend this time limit, for practical reasons and in the interests of consistency with the private sector privacy law.

Recommendation 31:

Amend section 56 to permit the Commissioner to extend the 90-day time limit to review access requests in a manner that is consistent with s. 50(8) of the *Personal Information Protection Act.*

Section 59 Duty to comply with orders

Section 59 sets out the duty of the head of a public body or the service provider to comply with a Commissioner's order within 30 days of delivery of the order. If an application for judicial review of the order is brought within the 30 days, it imposes an automatic stay of the Commissioner's order unless the Court orders otherwise. Because the automatic stay is not time limited, a third party can neglect or refuse to proceed with the judicial review.

In regard to this section, the previous statutory review committee made the following recommendation in its 2004 Report:

> *Amend section 59(2) and add a new section 59(3) to inhibit abuse of the judicial review process by time-limiting the automatic stay of the Commissioner's order.*

The Special Committee was informed by the Ministry of Citizens' Services that this recommendation remains under consideration, and we urge its speedy implementation.

Recommendation 32:

Amend section 59(2) and add a new section 59(3) to inhibit abuse of the judicial review process by time-limiting the automatic stay of the Commissioner's order.

Part 6 - General Provisions

Section 66 Delegation by the head of a public body

Section 66 of the Act authorizes the head of a public body (but not of a local public body) to delegate any of the head's duties, powers or functions to another person.

The submission of the Regional District of Fraser-Fort George pointed out that currently under section 66(3), the head of a local government body cannot delegate any of the duties assigned to that position. Its request for an amendment is endorsed by the Special Committee.

Recommendation 33:

Amend section 66 of the Act to include local government bodies in order that local governments have the option of appointing the Chair of the Board or the Mayor of the municipality as the head of the public body with the ability to delegate the duties, power or function to staff.

Section 71 Records available without request

Section 71 states that the head of a public body may designate records that are appropriate for routine release and make them available without a formal access request. To encourage greater use of this provision, the previous statutory review committee made the following recommendation in its 2004 Report:

> *Amend section 71 to require public bodies to make available to an individual his or her own personal information free of charge and without an access request, but subject to any access exceptions under the Act.*

The Special Committee learned from the Ministry of Citizens' Services that this recommendation still remains under consideration. We call for its speedy implementation as a way to promote open government.

Recommendation 34:

Amend section 71 to require public bodies to make available to an individual his or her own personal information free of charge and without an access request, but subject to any access exceptions under the Act.

Section 75 Fees

Section 75 allows public bodies to charge fees for certain services which they provide in the processing of formal FOI access requests and provides guidance in assessing or waiving such fees.

The maximum fees for service are set out in the Schedule in section 7 of the *Freedom of Information and Protection of Privacy Regulation* (B.C. Reg. 323/93). This fee schedule has not been amended since 1993 and so reflects the state of information technology at that time.

During the consultation process, the Special Committee received considerable input on the topic of fees, and opinion was divided on the question of whether fees are, in fact, a barrier to the right of access. Some members of the public identified "unreasonable fees" as a barrier to access rights, whereas local public bodies and lawyers argued that fees should be more realistic.

The Special Committee agrees with the original drafters of the Act that fees were never intended to be so prohibitive that people could not make applications for records. Examples of fees cited by witnesses struck some committee members as "quite astronomical" and defeating the whole purpose of access rights – for example, $16.50 a minute for the cost of using a central mainframe processor for producing a record. We believe a review of the fee schedule is long overdue and recommend that it be updated to reflect current technology.

Recommendation 35:

Review the Schedule of Maximum Fees with an emphasis on meeting the original objectives of the legislation and use the criterion of reasonableness throughout the whole process.

Summary of Recommendations

The Special Committee urges government to implement in a timely manner its recommendations for legislative amendments to the *Freedom of Information and Protection of Privacy Act* (the Act).

Part 1 - Introductory Provisions:

1. Add a new section 2(3) to acknowledge that information technology plays an important role in achieving the dual purposes of the Act by facilitating the routine disclosure of general information as well as enhancing safeguards for privacy protection.

2. Add a new section 2(4) to require that for an infringement of the right to privacy to be lawful, it must be proportional to the public interest that is achieved.

3. Include the British Columbia Society for the Prevention of Cruelty to Animals by using definition (b) of *public body* in Schedule 1 that makes provision for adding an "other body" by regulation to Schedule 2; and add the proviso that access rights pertain only to those records that relate to this Society's statutory powers.

4. Expand the definition of "public body" in Schedule 1 to include any corporation that is created or owned by a public body, including an educational body.

5. Amend Section 3 to clarify that records created by or in the custody of a service-provider under contract to a public body are under the control of the public body on whose behalf the contractor provides services.

6. Amend section 3(1)(e) by replacing "employees" with "faculty members and teaching support staff" of a post-secondary educational body.

Part 2 - Freedom of Information:

7. Add a new section at the beginning of Part 2 of the Act requiring public bodies - at least at the provincial government level - to adopt schemes approved by the Information and Privacy Commissioner for the routine proactive disclosure of electronic records, and to have them operational within a reasonable period of time.

8. Amend section 13(2) to require the head of a public body to release on a routine and timely basis the information listed in paragraphs (a) to (n) to the public.

9. Amend section 9(2) of the Act to require that public bodies provide electronic copies of records to applicants, where the records can reasonably be reproduced in electronic form.

10. Amend section 4(1) to establish that an applicant who makes a formal access request has the right to anonymity throughout the entire process.

11. Amend sections 5 and 9 to allow applicants a right of access to original records if reasonable.

12. Amend section 11 to reduce the time allowed for file transfers to ten business days.

13. Make section 14 a mandatory exception, by changing "may refuse" to "must refuse" except when the public body is the client and can choose to waive privilege, or, if the client is a third party, the client agrees to waive privilege.

14. Amend section 14 of the Act to state that decisions on the privileged status of materials when FOI requests are made must be referred to the Supreme Court of British Columbia.

15. Amend section 20(3) to provide for immediate release of all requested records if 90 days have elapsed since receiving the applicant's request; and to provide that an access request may be refused if the information will be published according to a statutory schedule.

16. Amend section 22(2) to state that the personal information of an individual who has been dead for over 20 years is a relevant consideration in determining whether the disclosure of the deceased's personal information would be an unreasonable invasion of personal privacy.

17. Amend section 22(3)(h), as follows: "The disclosure could reasonably be expected to reveal the substance of a personal recommendation, or evaluation, character reference, or personnel evaluation, that was supplied in confidence by a third party, or, to reveal the identity of the third party who supplied the reference in confidence." A corresponding amendment would be required to repeal section 22(5).

18. Amend section 22(4)(i) by adding "degree, diploma or certificate" granted to the third party by a public body.

19. Review section 25(1) in light of the Supreme Court of Canada decision, Grant v. Torstar Corp.

Part 3 - Protection of Privacy:

20. Amend the Act to allow an individual to consent to the collection, use and disclosure of their personal information by a public body (similar to the *Personal Information Protection Act*).

21. Amend the Act to include language confirming a broader approach to research so that applied research into issues, facts, trends, etc for the purpose of program planning and/or evaluation can be undertaken, provided that only de-identified data are used.

22. Consider holding public consultations on data sharing initiatives.

23. Appoint a Government Chief Privacy Officer.

24. Amend the Act to require that data sharing projects for the purpose of research must be subject to ethics review by an arm's length stewardship committee.

25. Add a requirement in the Act that privacy impact assessments must be completed at the conceptual, design and implementation phases of an electronic record project. This requirement should apply to health authorities as well as government ministries.

26. Amend the Act to reflect the approach taken in the *Personal Information Protection Act* with respect to the collection of employee personal information.

27. Re-examine the protocols regarding sharing health information with immediate family members.

28. Amend section 35 of the Act to permit a health care body to disclose de-identified personal health information without the individual's consent for legitimate research purposes.

Part 4 - Office and Powers of the Information and Privacy Commissioner:

29. Amend section 42 to explicitly give the Commissioner the power to require public bodies to submit statistical and other information related to their processing of freedom-of-information requests, in a form and manner that the Commissioner considers appropriate.

30. Combine the complaint process and the review and inquiry process - referred to in sections 42(2) and 52(1) respectively - into a unitary process for the Commissioner to investigate, mediate, inquire into and make orders about complaints respecting decisions under the Act and other allegations of non-compliance with the Act.

Part 5 - Reviews and Complaints:

31. Amend section 56 to permit the Commissioner to extend the 90-day time limit to review access requests in a manner that is consistent with section 50(8) of the *Personal Information Protection Act.*

32. Amend section 59(2) and add a new section 59(3) to inhibit abuse of the judicial review process by time-limiting the automatic stay of the Commissioner's order.

Part 6 - General Provisions:

33. Amend section 66 of the Act to include local government bodies in order that local governments have the option of appointing the Chair of the Board or the Mayor of the

municipality as the head of the public body with the ability to delegate the duties, power or function to staff.

34. Amend section 71 to require public bodies to make available to an individual his or her own personal information free of charge and without an access request, but subject to any access exceptions under the Act.

35. Review the Schedule of Maximum Fees with an emphasis on meeting the original objectives of the legislation and use the criterion of reasonableness throughout the whole process.

Appendix A: Schedule of Meetings

October 26, 2009	Organization
October 28, 2009	Briefings
February 2, 2010	Public Hearing, Vancouver
February 3, 2010	Public Hearing, Victoria
February 11, 2010	Organization
March 24, 2010	Briefing
March 31, 2010	Briefing
May 5, 2010	Deliberations
May 19, 2010	Deliberations
May 25, 2010	Deliberations
May 26, 2010	Deliberations
May 31, 2010	Adoption of Report

Appendix B: Witness List

Abbsry Used Tires Ltd., Wade Larson, Sub-51

Marilyn Abram, Sub-75

AMS Student Society of UBC Vancouver, Adrienne Smith, Sub-104

Animal Rights Coalition, Donna Liberson, 02-Feb-10 (Vancouver) Sub-24

Douglas Babcook, Sub-62

Alexis Barken, 02-Feb-10 (Vancouver) Sub-30

Don Barz, Sub-85

Hollister Baxter, Sub-13

BC Civil Liberties Association, Micheal Vonn, Sub-103

BC Freedom of Information and Privacy Association, Darrell Evans, Vincent Gogolek, 02-Feb-10 (Vancouver) Sub-22

BC Government and Service Employees' Union, Carol Adams, Sub-107

BC Health Coalition, Alice Edge, Rachel Tutte, Sub-110

BC Schizophrenia Society - Vernon, Beatrice Cormier, Sub-21

Clare Marie Belanger, Sub-1

Adrian Blais, Sub-49

Ron Bolin, Sub-40

Robert Botterell, 02-Feb-10 (Vancouver) Sub-25

British Columbia Hydro and Power Corporation, Scott Macdonald, Sub-87

British Columbia Library Association, Kenneth Cooley, Sub-95

British Columbia Lottery Corporation, Constance Ladell, Sub-96

British Columbia School Trustees Association, Connie Denesiuk, Stephen Hansen, Sub-84

Chris Budgell, 02-Feb-10 (Vancouver) Sub-23

Canadian Association of Journalists, Stanley Tromp, 02-Feb-10 (Vancouver) Sub-14

Canadian Bar Association, British Columbia Branch, Freedom of Information and Privacy Law Section, Alexis Kerr, Janina Kon, Sub-102

Canadian Centre for Policy Alternatives, Keith Reynolds, 03-Feb-10 (Victoria) Sub-35

Canadian Institute for Health Information, John Wright, Sub-77

Canadian Taxpayers Federation, Maureen Bader, Sub-41

Lynn Christensen, Sub-113

City of Chilliwack, Karla Graham, Sub-101

City of Port Moody, Colleen Rohde, Sub-111

Pauline Cohen, Sub-19

Confederation of University Faculty Associations of British Columbia, Rob Clift, 02-Feb-10 (Vancouver) Sub-97

CUPE BC Division, Barry O'Neill, Sub-83

Tom Currelly, Sub-46

David Dahm, Sub-114

Annette Davidson, Sub-66

David DeCosse, 02-Feb-10 (Vancouver) Sub-29

Donna Dewdney, Sub-20

David Disney, Sub-59

District of North Vancouver, James Gordon, Sub-38

Dogwood Initiative, Morgan Blakley, 03-Feb-10 (Victoria) Sub-36

Curtis Eastcott, Sub-61

Lyne England, 03-Feb-10 (Victoria) Sub-33

Vince Fairleigh, Sub-65

Josef Fischer, Sub-12

Rachel Forbes, Sub-88

Fraser Valley Real Estate Board, Deanna Horn, Sub-90

Friends of the Chilliwack River Valley, Wendy Bales, Zvonko Bezjak, Glen Thompson, 02-Feb-10 (Vancouver)

Norrie Froman, Sub-57

David Galloway, Sub-60

Ted Gerk, 03-Feb-10 (Victoria) Sub-32

George Good, Sub-71

Government of British Columbia, Ministry of Citizens' Services, Sharon Plater 28-Oct-09 (Victoria)

Government of British Columbia, Ministry of Citizens' Services, Kim Henderson, 21-Mar-10 (Victoria)

Government of British Columbia, Ministry of Citizens' Services, Dave Nikolejsin, 21-Mar-10 (Victoria)

Government of British Columbia, Ministry of Housing and Social Development, Cairine MacDonald, 21-Mar-10 (Victoria)

Government of British Columbia, Ministry of Public Safety and Solicitor General, David Morhart, 21-Mar-10 (Victoria)

Kevin Granger-Brown, Sub-44

Glenn Hallworth, 03-Feb-10 (Victoria) Sub-34

James Happer, Sub-70

Tony Hetman, Sub-52

Richard Holmes, Sub-68

Hospital Employees' Union, Judy Darcy, Sub-92

J.C. Hunter, Sub-76

Information Technology Association of Canada, Bill Munson, Sub-94

Insurance Corporation of British Columbia, David Wedemire, Sub-99

Dennis Jaques, Sub-42

Garth Johnson, Sub-69

Alice Johnston, Sub-81

Clint Kanester, Sub-9

George Kaufmann, 02-Feb-10 (Vancouver) Sub-27

Heather Keenan, Sub-15

Mike Kennedy, Sub-43

Gemma Laska, Sub-85

Law Society of British Columbia, Jeffrey G. Hoskins, QC, Sub-17

Local Government Management Association, Paul Hancock, Sub-82

Josie Lofting, Sub-3

Bruce MacLeod, Sub-74

D.H. Macleod, Sub-5

Jeff Marta, Sub-2

Kate Maxon, Sub-79

Linda Meyer, 02-Feb-10 (Vancouver) Sub-26

Pat Morton, Sub-56

Croft Murphey, Sub-47

Murrin Construction Ltd., Lindsay McInnis, Sub-78

Sy Murseli, Sub-16

Office of the Information and Privacy Commissioner, Catherine Tully, 28-Oct-09 (Victoria)

Office of the Information and Privacy Commissioner, A/Commissioner Paul Fraser, Celia Francis, Helen Morrison, Catherine Tully, 31-Mar-10 (Victoria)

Brandon Parker, Sub-50

Beatrice Patrick, 02-Feb-10 (Vancouver) Sub-28

Steven Patterson, Sub-7

Rodney J. Philippson, 02-Feb-10 (Vancouver)

Glenn Pineau, Sub-45

Arlene Pippolo, Sub-58

Population Data BC, Nancy Meagher, Sub-117

Regional District of Fraser-Fort George, Karla Jensen, Sub-89

Sharon Sadler, Sub-52

Janine Sakowicz, Sub-10

Salesforce.com, Kris Klein, Sub-116

Janet Sansalone, Sub-18

Alfred Schalm, Sub-72

Sharon Schnurr, Sub-6

David D. Schreck, Sub-11

Jill Scott, Sub-105

Roland Siegmund, Sub-63

Brian Skakun, Sub-98

Elizabeth Smith, Sub-53

Anne Spencer, Sub-73

Don Startin, 03-Feb-10 (Victoria)

Dave Stevens, Sub-80

Jason Testar, Sub-8

Donna Thompson, Sub-112

Elizabeth Thompson, 03-Feb-10 (Victoria) Sub-93

Bill Tozer, Sub-48

Sandra Trudell, Sub-67

Trial Lawyers Association of British Columbia, Bentley Doyle, Sub-118

University of British Columbia, Lorene Novakowski, Fasken Martineau, Sub-108

University of Victoria, Julia Eastman, Sub-106

Nancy Van Veen, Sub-4

Vancouver Island Strata Owners Association, Deryk Norton, Harvey Williams, 03-Feb-10 (Victoria) Sub-37

A.N. Thomas Varzeliotis, Sub-86

Victoria Police Department and Vancouver Police Department, Debra Taylor, Sub-100

Sally Volkers, Sub-64

Warren Walker, 02-Feb-10 (Vancouver) Sub-31

Mark Weiler, Sub-109

Josette Wier, Sub-39

Jonathan Young, Sub-55